No. 72-861

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

72-861

ADOLPH J. WAITKUS,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

ADOLPH J. WAITKUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on October 31, 1972, which affirmed the Petitioner's conviction and sentence for evasion of income tax.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit decided October 31, 1972, is not yet reported, but is printed in the Appendix herein at page App. 1.

JURISDICTION

The opinion and judgment of the United States Court of Appeals was entered on October 31, 1972.

A timely Petition for Rehearing was filed in the Court of Appeals for the Seventh Circuit and was denied on November 27, 1972 (App. 12). This Petition is filed within 30 days of the denial of the Petition for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is not the failure of Special Agents to comply with Internal Revenue Service rules and directions to inform taxpayers that said Special Agents are conducting a criminal investigation, and that the taxpayer has the right not to answer questions nor produce records, and that he has a right to consult a lawyer, a denial of due process and equal protection of the laws as provided by the Constitution of the United States?

2. Is the Seventh Circuit Court of Appeals decision not to apply its decision in *United States* v. *Dickerson*, 413 F.2d 1111 which requires Internal Revenue Service Agents to give *Miranda* type warnings to a taxpayer on initial contact, an unfair and arbitrary decision denying the petitioner due process and equal protection of the law in light of the fact that *Dickerson* was decided prior to the trial of this case?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Amendment V, Constitution of the United States

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Title 26, United States Code, Section 7201

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Internal Revenue Service News Release No. 897, October 3, 1967, in pertinent part:

> "On initial contact with a taxpayer, Internal Revenue Service Special Agents are instructed to produce their credentials and state: 'As a Special Agent, I have the function of investigating the possibility of criminal tax fraud.' If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel."

STATEMENT OF THE CASE

NATURE OF THE CASE AND ITS DISPOSITION

Adolph J. Waitkus was indicted in indictment No. 69 CR 211 in the United States District Court for the Northern District of Illinois, of five counts alleging wilful and knowing evasion of income tax for the years 1962, 1963, 1964, 1965 and 1966 in violation of 26 U.S.C. 7201 (R. 2, A. 13). The defendant filed a motion for return of seized property and the suppression of evidence pursuant to Rule 41(e) of

the Federal Rules of Criminal Procedure (R. 24, A. 16), and a hearing was eventually had on this motion on October 29, 1969 (R. 28). On January 15, 1970, the Court entered its order denying the defendant's motion to return seized property and to suppress evidence (R. 34, A. 80). Subsequently, on September 30, 1970, the defendant filed a written waiver of his right to trial by jury, which waiver was consented to by the United States Attorney and approved by the District Court (R. 44, A. 80). The cause was then heard as a bench trial upon stipulation and memoranda (R. 45, A. 80). On June 4, 1971, the Court entered its "Decision On The Merits" and entered a finding of guilty on each of the five counts of the indictment (R. 60, A. 92). Motions for judgment of acquittal notwithstanding the finding, or in the alternative for a new trial and in arrest of judgment, were denied, and on July 2, 1971, the Court sentenced the defendant to the custody of the Attorney General for a period of two years on each of the five counts, said sentences to run concurrently (S.R. 4, A. 97).

HEARING ON MOTION TO SUPPRESS

Proceedings of October 29, 1969

At the hearing on defendant's motion for the return of property and to suppress evidence, two Special Agents of the Internal Revenue Service testified. Charles Shurtleff testified that he was a Special Agent of the Internal Revenue Service, whose duty was to conduct income tax investigations to determine whether there had been any violations of the Criminal Sections of the Internal Revenue Code (Tr. 4, A. 102). He stated that on August 8, 1966, he and William F. Barrett, another Special Agent of the Internal Revenue Service, visited the defendant at his

place of business from approximately 10:00 A.M. to 1:30 P.M., and that during that interview, he asked the defendant questions and obtained certain materials or documents from the defendant (Tr. 5-6, A. 102-103).

The interview took place at the defendant's drug store in Chicago Heights, Illinois, in the back of the drug store behind the counter in the rear of the store. Special Agent Shurtleff testified that there was no room for anyone to sit in this area, and that the interview lasted approximately two-and-a-half hours. Special Agent Shurtleff went on to testify that the following day, August 9, 1966, he and Barrett again returned to the defendant's drug store, and on that day, obtained more documents from the defendant. He further testified that again on August 12, 1966, he and Barrett went to the defendant's drug store and again obtained documents from the defendant (Tr. 12, A. 107). Although Shurtleff had written a memorandum of interview for the August 8 visit (Tr. 6, A. 103), there were no records of the interviews on August 9 and 12.

The Special Agents again returned to the defendant's place of business on September 19, 1967, and again asked questions of the defendant and obtained documents from him. That visit lasted from approximately 9:45 A.M. to 4:50 P.M. Defendant's Exhibit 2 is the memorandum of the interview of September 19, 1967 (Tr. 14, A. 108). The two Special Agents again interviewed the defendant Waitkus on November 21, 1967. Defendant's Exhibit 3 was the memorandum of that interview (Tr. 22, A. 114). On November 29, 1967, the defendant was interviewed in the Internal Revenue Service office at 20 E. Cass Street in Joliet, Illinois. He appeared in response to a request by the agents (Tr. 23, A. 115). Defendant's Exhibit 4 is a memorandum of that interview. The office in Joliet,

Illinois in which Mr. Waitkus was interviewed was Agent Shurtleff's office, approximately 15 ft. by 15 ft. in dimension. The room is windowless and contained a desk, some book shelves, chairs and file cabinets (Tr. 29, A. 119). That interview was conducted by Special Agent Shurtleff and Revenue Agent Edward Carey, who were the only persons present other than Mr. Waitkus (Tr. 29, A. 119). Shurtleff testified that at the question-and-answer session in Joliet, Illinois on November 29, 1967, part of the session was tape recorded and part of it was not. The reason for this was that when Shurtleff read a form, warning Mr. Waitkus of his constitutional rights to remain silent and to consult counsel, that Mr. Waitkus objected to the fact that he had never been given a written form like that, nor had he been advised of his rights before, that he did not want to answer questions on the record. Nevertheless the interview did continue off the record (Tr. 37-38, A. 124-125). The memorandum of interview of November 29, 1967 indicates that Mr. Waitkus stated that he wanted to consult an attorney, and that he would rather have an attorney (Tr. 39, A. 126). The transcript further indicates that Mr. Waitkus also indicated that he was not warned of his rights in any of the previous interviews at his drug store (Tr. 40, A. 126).

Special Agent Barrett testified that he was a Special Agent of the Intelligence Division of the Internal Revenue Service, and that he was present at the interviews of Mr. Waitkus, with the exception that he was not present at the interview of November 29, 1967 (Tr. 46, A. 130). It was then stipulated that the memoranda of interview marked as Defendant's Exhibits 1, 2, 3, 4 and 5 would be admitted into evidence, and that the Special Agents would testify in accordance with their memoranda (Tr. 48, A. 131). The Court denied the defendant's motion to suppress on January 15, 1970.

TRIAL

The cause was then heard as a stipulated bench trial. The stipulation entered into between the United States and the defendant and his attorneys at R. 45, A. 129, composed the evidence on the trial. Said stipulation was entered into subject to the defendant's continuing objection on the basis of the fact that virtually all the evidence was obtained in violation of the defendant's constitutional rights, and that the Court erred in refusing to suppress said evidence, and to certain other objections based upon relevance and materiality.

The District Court, after considering the stipulation and exhibits which were admitted into evidence, and the memoranda of the parties, found the defendant guilty as charged on each of the five counts of the indictment (Tr. 60-61, A. 139-140), and subsequently, after denying the defendant's motions for judgment of acquittal notwithstanding the finding of the Court or in the alternative for a new trial, and in arrest of judgment, sentenced the defendant to two years' imprisonment on each of the five counts, said sentences to run concurrently.

The conviction and sentence imposed were appealed to the United States Court of Appeals for the Seventh Circuit, which Court entered its opinion affirming the petitioner's conviction and sentence on October 31, 1972 (App. 1). The Court of Appeals held that it would not apply its decision in *United States* v. *Dickerson*, 413 F.2d 1111, to petitioner's case even though petitioner was not tried until after the decision in *Dickerson*.

A Petition for Rehearing was filed and subsequently denied on November 27, 1972 (App. 12)

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT THE DEFENDANT'S MOTION TO SUPPRESS WAS IMPROPERLY DENIED.

Virtually all of the evidence involved in this case was obtained by Special Agents of the Internal Revenue Service from the defendant over the course of five interviews between August, 1966 through November 29, 1967. It is made clear in the memorandum of the interview of November 29, 1967, that the defendant had not been informed of his rights and the fact that he was the subject of a criminal investigation until that date. (R. 24, A. 52) It is further clear from that memorandum that once the defendant was informed of his rights, he said he wanted a lawyer (R. 24, A. 52), yet the interview is continued "off the record".

It is argued that the defendant, not being warned of his rights, was denied due process of law and equal protection of law.

It has been noted by the Court of Appeals that ". . . since May, 1967, the Internal Revenue Service has required special agents to give a modification of the *Miranda* warnings to taxpayers at the first interview." (*United States* v. *Dickerson*, 413 F.2d 1111 at 1117, note 13) It is further pointed out that on October 3, 1967, the Internal Revenue Service issued written instructions to all Special Agents requiring warnings on initial contact. (I.R.S. News Release No. 897, Oct. 3, 1967; *United States* v. *Heffner*, 420 F.2d 809, 811.)

It is thus argued that as the Fourth Circuit in *United States* v. *Heffner*, 420 F.2d 809, and the First Circuit in *United States* v. *Leahey*, 434 F.2d 7 have held, the failure of

the Special Agents in this case to inform the defendant of his rights in interviews prior to November 29, 1967, and to continue the interview of November 29, 1967 "off the record" after the defendant stated he wanted a lawyer, denied the defendant the due process of law and equal protection as those rights are guaranteed in the Fifth Amendment.

Particularly, as the Supreme Court has stated in *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681, an agency of the government must scrupulously observe the rules, regulations, or procedures it has established. This principle has been followed in numerous decisions. (See cases listed in *United States* v. *Heffner*, 420 F.2d 809 at 812.)

The Court of Appeals erred in finding, on Page 7 of the opinion, that, "Defendant was never misled or in doubt as to the purpose of the investigation at the time of the first contact of the Special Agents with him." The Court has apparently failed to consider that from the very outset, the investigation herein was a criminal investigation. The first agents and only agents to contact the defendant were Special Agents of the Internal Revenue Service, whose duty as testified to by Special Agent Shurtleff was to conduct income tax investigations to determine whether there had been any violations of the criminal sections of the Internal Revenue Code (Tr. 4, A. 102).

While the agents may have identified themselves as Special Agents to the defendant at the first interview on August 8, 1966, it is clear they did not inform the defendant that the sole purpose of their investigation was to find criminal violations, and that the defendant had constitutional rights not to incriminate himself, to refuse to

give them any of his records, and to have the advice of counsel before any questioning. While it is true that the first interviews took place prior to the Internal Revenue Service's announced regulation requiring certain warnings to be given to taxpayers, it should be noted that every interview in this case took place after the United States Supreme Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436.

It is further argued that the Court of Appeals erred by, in effect, finding that the defendant knowingly and willingly waived his rights to counsel and not to incriminate himself during the interviews that took place herein, and that the conduct of the defendant was to "proceed without counsel and to cooperate voluntarily until the investigation was closed". (Opinion p. 7)

The Internal Revenue Service's own recording and transcript of the interview which took place on November 29, 1967, clearly demonstrates that until the defendant was advised by Agent Shurtleff at that time of his constitutional rights, he did not fully understand his rights and could not have knowingly and intelligently waived them.

It is clear, in this case, that the I.R.S. regulations were not followed, and the arbitrariness which the regulations sought to avoid occurred here. The defendant was denied due process and equal protection of law, the evidence thus obtained should have been suppressed, and thus the conviction here should be reversed.

2. THE COURT OF APPEALS DECISION IN UNITED STATES v. DICKERSON SHOULD APPLY TO THIS CASE.

On July 28, 1969, long before the case at bar was on trial, the Court of Appeals announced its opinion in *United*

States v. *Dickerson*, 413 F.2d 1111, requiring full compliance with *Miranda* v. *Arizona*, 384 U.S. 436 by Special Agents of the Internal Revenue Service on initial contact with the taxpayer. However, that Court specified that the decision was to be prospective only to interviews conducted after the date of the opinion: July 28, 1969.

It is suggested that this part of the Court's decision, prospective application, has created an unfair and arbitrary situation and denies this defendant due process and equal protection of the law.

It might be noted that the interviews involved in the *Dickerson* case occurred in 1965, long before the interviews in the case at bar. Further, it might be noted that in a companion case, *United States* v. *Habig*, 413 F.2d 1108, which happened to be on appeal at the same time as *Dickerson*, the interviews occurred in 1963 and 1964, yet *Habig* is given the benefit of the *Dickerson* opinion because of the accident of being on appeal at the same time.

It is also noted that as pointed out in *Dickerson*, in note 6 at 413 F.2d 1114, that if this defendant had been fortunate enough to have a different judge in his District hear his case, the evidence might have been suppressed.

It is suggested that to avoid the arbitrariness which has thus been created, the Seventh Circuit's decision in *Dickerson* should at least be made prospective only to cases in which the trial started after the decision in *Dickerson*. In *Dickerson*, the Court recognized that *Miranda* was made prospective to trials beginning after the date of the decision, *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L.Ed. 2d 882 (413 F.2d 1117). Such a holding would not work a hardship on the Internal Revenue Service, since as pointed out in point 1 herein, the I.R.S. has been requiring some

such warning since May, 1967, and also, the I.R.S. was certainly aware of the *Miranda* decision (June 13, 1966) prior to the interviews in the case at bar.

While it is noted that the Court of Appeals specifically limited its holding in *United States* v. *Dickerson*, 413 F.2d 1111, to apply to interrogatories taking place after the date of that decision, this Court has not explained why *Dickerson* should be treated differently than the United States Supreme Court treated its own decision in *Miranda*, which of course *Dickerson* is based upon. It seems to this petitioner that there is no difference in the effect of the holdings in *Miranda* and *Dickerson*, and that the issue of prospectivity should be treated uniformly in both cases, and that thus *Dickerson* should be made applicable to cases in which the trial started after the decision in *Dickerson*, and thus applicable in this case.

CONCLUSION

For the foregoing reasons, the Petitioner prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 71-1568

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ADOLPH J. WAITKUS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69-CR-211 — EDWIN A. ROBSON, *Judge.*

ARGUED SEPTEMBER 15, 1972 — DECIDED OCTOBER 31, 1972

Before HASTINGS, *Senior Circuit Judge,* PELL and STEVENS, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* Defendant Adolph J. Waitkus was charged in a five-count indictment returned March 27, 1969, with willful and knowing evasion of his federal income tax for the years 1962, 1963, 1964, 1965

and 1966, in violation of Title 26, United States Code, Section 7201.[1] On October 19, 1969, defendant filed a motion pursuant to Rule 41(e), Federal Rules of Criminal Procedure, Title 18 U.S.C.A., to suppress the evidence obtained in the course of the investigation of his tax returns and for the return of the seized property. A hearing was held on such motion October 29, 1969. Following the submission of memoranda by both parties, on January 15, 1970, the trial court ruled orally from the bench and denied defendant's motion to suppress and to return seized property.

Subsequently, on September 30, 1970, defendant filed a written waiver of his right to trial by jury, which was consented to by the United States Attorney and approved by the trial court. The case was tried to the court upon a written stipulation and memoranda. On June 4, 1971, the court entered its "Decision on the Merits" finding defendant guilty on each of the five counts of the indictment. Motions by defendant for judgment of acquittal notwithstanding the finding, or in the alternative for a new trial and in arrest of judgment, were denied. On July 2, 1971, the court sentenced defendant to the custody of the Attorney General for a period of two years on each of the five counts, such sentences to run concurrently.

Defendant presents two issues for our review. First, whether the trial court erred in denying defendant's

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[1] Section 7201 provides:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

motion to suppress evidence based upon his claim that he was denied due process of law by the Internal Revenue Service through the alleged failure of its special agents to properly and timely inform him of his rights to silence and counsel during the stages of the conduct of a criminal investigation. Second, whether we should broaden our ruling and holding in *United States* v. *Dickerson,* 7 Cir., 413 F.2d 1111 (1969).

Defendant, a pharmacist, owned and operated a retail drug store in Chicago Heights, Illinois, for a number of years, including the years 1966 and 1967. He personally filled all prescriptions for drugs and medicines received from doctors. Although indisputably misrepresenting at all stages of the investigation and trial that his tax returns under review correctly stated his gross income and taxable income and that all his expenditures came solely from his store income, nevertheless defendant became a man of substantial means. Illustrative of this was that, among other things, he acquired a home of the present value of $100,000 free of debt; stock in several hundred corporations and numerous accounts in various banks and savings and loan associations; $100,000 in United States Treasury bills; his store business and inventory; a $30,000 interest in a family mausoleum; $100,000 in life insurance with annual premiums of $6,000; new Cadillac automobiles for himself and his wife; and a new car for his son and a used car for his store business. In addition, defendant claimed he paid all educational and living expenses for his family from the same source.

This leaves us, of course, with the two critical questions of the admissibility of the evidence establishing such facts, now raised on appeal.

I.

Upon consideration of the motion to suppress and for return of seized property in a hearing held on October 29, 1969, the trial court had for consideration exhibits A, B, C, D, E, F and G attached to the motion, the Government's answer thereto, the testimony of Special Agents Shurtleff and Barrett of the Internal Revenue Service, Intelligence Division, a number of documentary exhibits and post-hearing memoranda filed by both parties. As previously noted, the trial court orally ruled from the bench on January 15, 1970, denying defendant's motion.

Exhibit A to such motion was the memorandum of interview of defendant by Agents Shurtleff and Barrett on August 8, 1966, in defendant's drug store. Exhibit B was the memorandum of interview of defendant by Agents Shurtleff and Barrett and Revenue Agent Edward C. Carey on September 19, 1967, in defendant's drug store. Exhibit C was the memorandum of interview by Agents Carey and Shurtleff on November 29, 1967, in the Internal Revenue offices at Joliet, Illinois. Exhibit D is a transcript of certain testimony of defendant taken during the November 29, 1967, interview and transcribed by a reporter from a tape recording. Exhibit E was a memorandum of interview of defendant by Agents Carey, Shurtleff, and Barrett on July 3, 1968, in defendant's drug store. Exhibit F was a memorandum of telephone conversation between defendant and Agent Shurtleff on July 12, 1968. Exhibit G was a memorandum of interview of defendant by Agents Carey, Shurtleff and Barrett on November 21, 1967, in defendant's drug store.

Based upon all matters submitted to the trial court for its consideration of the motion to suppress and for return of seized property, the trial court would have been justified in believing the following factual narrative to be true.

On August 8, 1966, Special Agents Shurtleff and Barrett called on defendant at his drug store, presented their credentials and identified themselves to defendant as special agents of the Intelligence Division, Internal Revenue Service. They advised defendant that they were there to make an investigation of his federal income tax returns for the years 1962 through 1965. Defendant took them to the rear of his store for the interview, stating that "everything is alright, and we have nothing to worry about." Defendant was then questioned about his 1962, 1963 and 1964 returns. He stated they contained all of his income and expenses and there were no charges to be made, and that his returns had been prepared by John G. Zarante of Chicago Heights, a bookkeeper who maintained his records. Defendant told about his family, his business, his bank debts, his home, automobiles, life insurance, bank and several savings accounts and about $7,000 or $8,000 of stock in "AT&T" and "Illinois Bell Telephone" purchased through Merrill Lynch, Pierce, Fenner & Smith. He was asked to explain some of the entries in and apparent omissions from his tax returns. When defendant's answers proved unsatisfactory, the agents then advised him they would have to make a thorough examination because they could not understand how defendant could operate on the income he was reporting. Defendant became somewhat agitated and said he had not been guilty of any larceny or thieving and had no "criminal intent" and that there was nothing wrong with his tax returns. He was asked if his records were where they could be examined and he said he did not know. He said he would try to get his records together that night at home so they could examine them the next day. He gave the agents some of his prescription record books and agreed that they might take them to their office for examination.

The agents returned to defendant's drug store again on August 9 and 12, 1966. No memoranda of these interviews were made but the agents obtained additional documents from defendant. The details of the August 8, 1966, memorandum of interview made it quite clear that the special agents immediately identified themselves to defendant and that defendant was aware of who they were and of their purpose in visiting him.

The defendant was not contacted again until more than a year later, on September 19, 1967, when the agents returned to defendant's drug store. They again identified themselves and informed defendant fully of his constitutional rights, including his rights to silence and counsel before he answered any questions, adding that this was now a serious matter and could result in criminal action. Nevertheless, defendant stoutly maintained that everything he did was correct, that he had nothing to hide and was not afraid to answer any questions and would gladly do so and *that he did not want any attorney.* The examination then began. Defendant's bookkeeper, Zarante, was called to the store and stated he only reported the information in the returns that defendant had given him and that he was never permitted to see defendant's cancelled checks or bank statements. Zarante said he had mentioned to defendant many times that he could not understand how defendant could live on such a small amount of income. Zarante urged defendant to tell the truth, stating to him that this was a criminal fraud investigation. Defendant stoutly maintained he had reported all of his income.

At a brief third visit at the drug store on November 21, 1967, defendant agreed to come to the office of the Internal Revenue Service at Joliet, Illinois, on November 29, 1967, for a further interview. At this office interview

the agents read to defendants a full and complete statement of his constitutional rights and began taping on a recorder the question and answer proceeding. Defendant objected to the tape recording and it was cut off. The interview then proceeded off the record.

We need not further detail the record of the interviews and exhibits to the motion to suppress and return.

Defendant complains that the Internal Revenue Service did not follow its own rules directing its special agents who are conducting a criminal investigation to inform taxpayers of their rights to silence and counsel. This, of course, is a reference to a regulation promulgated on October 3, 1972,[2] concerning the warnings to be given by its special agents, as required by the Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436, 467-473 (1966).

The interviews in August 1966 and on September 19, 1967, were conducted prior to the promulgation of the subject regulation on October 3, 1967. Obviously, we may not make the regulation retroactive to these interviews. Further the special agents did all they were required to do at the August 1966 interviews in light of the prevailing practice at that time. Defendant was made aware

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[2] The Internal Revenue Service News Release No. 897, October 3, 1967, provides in pertinent part:

> "On initial contact with a taxpayer, Internal Revenue Service Special Agents are instructed to produce their credentials and state: 'As a Special Agent, I have the function of investigating the possibility of criminal tax fraud.' If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel."

of the identity of the agents and the purpose of their first call, and said, "I know, I know." At the outset of the September 19, 1967, interview defendant was advised of his rights to silence and counsel and several times was further warned that the investigation was criminal in nature. Defendant emphatically stated he did not want a lawyer and willingly answered questions and furnished some of his records. Applying the *Miranda* rationale and that of countless other cases stemming from it, we find no showing that defendant was in custody or was deprived of his freedom of action in any significant way at the inception of his first contact with the special agents. Under all the circumstances surrounding the prior interviews in August 1966 and September 1967, we see no basis for finding a denial of due process to defendant. *Cf., Cohen* v. *United States*, 8 Cir., 405 F.2d 34 (1968), cert. denied, 394 U.S. 943 (1969).

At the November 29, 1967 office interview, defendant protested that he had not been previously advised of his rights to silence and counsel by a *formal reading* of such rights to him. It developed that his real objection was to having the interview recorded on tape and that defendant did not want to answer any questions as long they they were being recorded on tape. He did not affirmatively state he was unwilling to proceed without any attorney. When the tape recorder was cut off at that time, defendant freely cooperated with the agents and the interview was continued.

We conclude that defendant was never misled or in doubt as to the purpose of the investigation at the time of the first contact of the special agents with him; that he was timely and properly warned of the criminal nature of the investigation as it passed into the accusatorial stage of the proceeding; that he was given full-dress

Miranda warnings from the time on November 29, 1967, when the obligation to do so first arose; that the constant pattern of defendant's conduct during the entire investigation was to proceed without counsel and to cooperate voluntarily until the investigation was closed; and that defendant has wholly failed to establish any tenable basis to show a denial of due process.

We hold, therefore, that the trial court did not err in denying defendant's motion to suppress and return seized property.

II.

In *United States* v. *Dickerson*, 7 Cir., 413 F.2d 1111, 1116-1117 (1969), we held that without regard to a taxpayer's subjective state of mind, *Miranda* warnings must be given to a taxpayer under criminal investigation by either the revenue agent or the special agent at the inception of the first contact with taxpayer after the case has been transferred to the Intelligence Division of the Internal Revenue Service, and that absent such warning and advice, the documentary and oral information obtained from the taxpayer by the agents was subject to suppression.

Recognizing that this ruling represented a departure from the present state of the law and a new implementation of the *Miranda* policy, our court determined that this decision should be made prospective only "to interrogations taking place after the date of this decision [July 28, 1969]." *Id.* at 1117. Defendant would have us broaden the holding in *Dickerson* so that it "should at least be made prospective only to cases in which the trial started after the decision in *Dickerson*." In effect, defendant urges that we substitute the date of the trial for the

date of interrogations. Obviously, this would bring Waitkus under the umbrella of *Dickerson*. This we shall not do.

In *United States* v. *Gallagher*, 7 Cir., 430 F.2d 1222, 1224 (1970), in an opinion authored by Judge Cummings, who spoke for our court in *Dickerson*, we again expressly limited *Dickerson* to interrogations taken after the date of that decision. Recently, in *United States* v. *Ming*, 7 Cir., ... F.2d ..... (Slip Opinion No. 71-1083, p. 13, May 26, 1972), cert. denied, ... U.S. ..... (Oct. 16, 1972), we again saw "no need to re-examine our limited prospective application of *Dickerson*," and held that since the interrogations took place *before* our decision in *Dickerson*, the defendant Ming was not entitled to its application there.

For the third time, therefore, we respectfully decline to broaden our holding in *Dickerson*.

In sum, we quote with approval from the memorandum opinion of Chief Judge Robson:

> "With respect to each count of the indictment, the court finds beyond a reasonable doubt that the defendant willfully and knowingly attempted to defeat and evade payment of a substantial portion of the income tax he owed to the Government. The uncontradicted evidence reveals a consistent pattern of gross understatement of income and overstatement of expenses. The evidence further reveals that the defendant lied to agents of the Internal Revenue Service with respect to his ownership of securities. • • • As

well documented by the uncontroverted evidence, the defendant secreted most of his income from the Government for the five years in issue. Under the circumstances shown here, it is clear that the defendant acted knowingly and wilfully in order to avoid paying the major portion of his tax liability. *See United States* v. *Mansfield,* 381 F.2d 961 (7th Cir. 1967), cert. den. 389 U.S. 1015 (1967), and cases cited therein."

Since we are convinced from our appraisal of this record that defendant Waitkus was not denied due process at any stage of the investigation and that the trial court did not err in denying defendant's motion to suppress and return seized property, the judgment of conviction is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 27, 1972

Before

Hon. JOHN S. HASTINGS, SR., *Circuit Judge*

Hon. WILBUR F. PELL, JR., *Circuit Judge*

Hon. JOHN PAUL STEVENS, *Circuit Judge*

No. 71-1568

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ADOLPH J. WAITKUS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(69 CR 211)

On consideration of the Petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be and the same is hereby *denied.*

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-861

ADOLPH J. WAITKUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In March 1969, after a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on five counts of having willfully attempted to evade and defeat payment of substantial portions of his individual income tax for the calendar years 1962–1966, in violation of 26 U.S.C. 7201. He was sentenced to concurrent prison terms of two years on each of the five counts. The court of appeals affirmed (Pet. App. A) and denied rehearing (Pet. App. B).

The government's proof at trial was based on the net worth-expenditures method and showed that petitioner had understated his taxable income by approxi-

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mately $24,600 in 1962, $26,000 in 1963, $33,300 in 1964, $32,400 in 1965, and $19,300 in 1966 (R. 95–96).[1] Petitioner does not now dispute the correctness or sufficiency of this proof.

Petitioner contends (Pet. 8–10) that investigating Special Agents of the Internal Revenue Service failed to provide him with the warnings required by Internal Revenue Service News Release No. 897, promulgated October 3, 1967, and that this alleged failure deprived him of due process of law. However, as the court below noted, the only interviews during which petitioner may not have been warned of his constitutional rights took place prior to October 3, 1967,[2] and petitioner was fully informed, even at the time of those interviews, of the purpose of the investigation (Pet. App. A, 5–6). Thus petitioner's contention that the investigating agents failed to comply with the applicable Internal Revenue Service procedures is factually erroneous. Furthermore, when the investigation reached a more serious stage, during the interview of September 19, 1967, petitioner was fully informed of his constitutional rights (Pet. App. A, 6). None of these interviews was custodial; petitioner remained free from indictment and arrest for several months thereafter. Thus, as petitioner apparently recognizes, nothing in this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436, required that warnings be given even

[1] "R." refers to the appendix filed in the court of appeals.

[2] Although petitioner claims that he was not given warnings at a subsequent interview on November 29, 1967, the courts below determined that "[a]t [that] office interview the agents read to [petitioner] a full and complete statement of his constitutional rights" (Pet. App. A, 6–7).

though some were in fact given at the latter stages of the investigation. See, *e.g.*, *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943.

Petitioner additionally contends (Pet. 10–12) that the Seventh Circuit should have given retroactive application to its decision in *United States* v. *Dickerson*, 413 F. 2d 1111, holding that a special agent must furnish a taxpayer with a full warning of constitutional rights upon first contact, whether or not the taxpayer is in custody. The *Dickerson* decision stands alone among the circuits,[3] and the court below acted well within its province in declining to extend that holding to interrogations taking place before the date of the decision. This Court has stated that a "'large measure of judicial discretion'" is permitted in determining the retroactivity of a decision requiring warnings of constitutional rights in situations where they were not previously mandated. *Jenkins* v. *Delaware*, 395 U.S. 213, 218. The Seventh Circuit properly exercised this discretion in view of the justifiable reliance by the Internal Revenue Service on prior de-

[3] All courts of appeals which have considered the question, except the Seventh Circuit, have held that since the taxpayer is not in custody or deprived of his freedom in any significant way the requirements of *Miranda* do not apply. *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz*, 433 F. 2d 415, 417–420 (C.A. 3); *United States* v. *Mancuso*, 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agamanos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, 399 U.S. 910; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10).

cisions contrary to *Dickerson*. The retroactive application of *Dickerson* would entail an unreasonable disruption of the criminal process, for tax evasion cases must sometimes be tried long after commission of the offense, due to the difficulties inherent in detecting and investigating such crimes. Cf. *Desist* v. *United States*, 394 U.S. 244, 249–254; *United States* v. *Gallagher*, 430 F. 2d 1222 (C.A. 7).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973